

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES MICHAEL FECI,

Petitioner,

v.

ROBERT BURTON,

Respondent.

No. 2:20-cv-00878-KJM-CKD P

ORDER AND

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se and in forma pauperis in this habeas corpus action filed pursuant to 28 U.S.C. § 2254. Currently pending before the court is petitioner's motion to submit new claims which the court liberally construes as a motion to amend his § 2254 petition. See ECF No. 47. On April 18, 2022, the court ordered briefing on the motion to amend. ECF No. 50. Respondent filed an opposition and petitioner has filed a second motion to amend which the court construes as a reply brief. ECF Nos. 51, 53. Thus, the matter is deemed submitted. For the reasons explained below, the undersigned recommends denying petitioner's motion to amend.

I. Factual and Procedural History

Petitioner was convicted in the Sacramento County Superior Court of voluntary manslaughter with a firearms enhancement and sentenced to a total term of 15 years incarceration. ECF No. 1 at 1. The California Court of Appeal affirmed his conviction on

1 December 18, 2019. ECF No. 11-2 at 1-22 (direct appeal opinion). The California Supreme
2 Court denied a petition for review on February 26, 2020. ECF No. 1 at 19.

3 On April 6, 2020, petitioner filed the instant federal habeas corpus application raising
4 seven claims for relief. In his first claim for relief, petitioner raises a Sixth Amendment
5 confrontation clause challenge to the admission of his wife's statement to the police during his
6 cross-examination by the prosecutor. ECF No. 1 at 37. Petitioner separately asserts that his trial
7 lawyer was ineffective for failing to object to the admission of this statement on confrontation
8 clause grounds. ECF No. 1 at 61. In his third claim for relief, petitioner asserts that his wife's
9 statement was erroneously admitted by the trial court in violation of state evidentiary laws.¹ ECF
10 No. 1 at 66. Next, petitioner contends that his Fourteenth Amendment right to due process was
11 violated based on the admission of the same statement. ECF No. 1 at 69. In his fifth claim for
12 relief, petitioner challenges the use of CALCRIM No. 3471, the jury instruction on self-defense,
13 as a violation of his right to due process. ECF No. 1 at 71. Next, petitioner contends that the trial
14 court erred in utilizing CALCRIM No. 3472 because it was not supported by substantial
15 evidence. ECF No. 1 at 87. Lastly, petitioner raises a cumulative error claim. ECF No. 1 at 92.

16 On March 31, 2021, the district court judge adopted the Findings and Recommendations
17 issued on October 30, 2020 finding claims two and four were unexhausted. ECF No. 36. The
18 court granted petitioner a stay and abeyance pursuant to Kelly v. Small, 315 F.3d 1063, 1074 (9th
19 Cir. 2002), to exhaust these two claims for relief. ECF No. 36. Petitioner filed a motion to lift
20 the stay of these proceedings in addition to amending his habeas petition on March 12, 2022.²
21 ECF No. 47. On March 29, 2022, the district court judge lifted the stay of this case and referred
22 the matter back to the undersigned for further proceedings. ECF No. 49.

23 ////

24 ////

25 ¹ This claim was dismissed by order dated March 31, 2021 because it only concerned state
26 evidentiary laws which are not cognizable on federal habeas review.

27 ² All of petitioner's filing dates have been calculated using the prison mailbox rule. See Houston
28 v. Lack, 487 U.S. 266 (1988).

1 **II. Motion to Amend**

2 On March 12, 2022, petitioner filed a request for authorization to amend his pending
 3 § 2254 petition. ECF No. 47. While petitioner did not submit a proposed amended § 2254
 4 petition, he did attach the California Supreme Court habeas petition that included the two claims
 5 he now seeks to add to his federal petition. ECF No. 47 at 52-82. The proposed first new claim
 6 for relief asserts that an exhibit was suppressed from the Clerk’s Transcript on appeal. ECF No.
 7 47 at 52-82. Petitioner also contends that his appellate counsel was ineffective for not noticing
 8 and correcting this error. *Id.* The second new claim for relief alleges that the prosecutor
 9 committed a Brady³ violation by suppressing impeachment evidence in the form of dog blood.
 10 *Id.* Petitioner also requests that the court “forgive the statute of limitations due to Coronavirus
 11 and [his] health problems” from getting the disease in January 2021. ECF No. 47 at 2. Lastly,
 12 petitioner notifies the court that he wants to withdraw grounds 2 and 4 of his pending federal
 13 habeas petition for which he was granted a stay.⁴ ECF No. 47 at 2.

14 Respondent opposes the motion to amend because the new claims would be untimely.
 15 ECF No. 51 By respondent’s calculation, the one year statute of limitations commenced on May
 16 27, 2020, following the expiration of time to seek certiorari review by the Supreme Court. ECF
 17 No. 51 at 3. The statute of limitations expired one year later on May 26, 2021. *Id.* Petitioner’s
 18 original § 2254 petition was timely filed on April 6, 2020. ECF No. 1 at 16. However, the one-
 19 year statute of limitations expired on May 26, 2021. ECF No. 51 at 3. Even with additional
 20 statutory tolling during the pendency of petitioner’s first state habeas application in the
 21 Sacramento County Superior Court, the statute of limitations expired on July 2, 2021.⁵ ECF No.
 22 51 at 4. Petitioner’s remaining state habeas corpus petitions were filed after the statute of

23 ³ See Brady v. Maryland, 373 U.S. 83 (1963) (holding that suppression by the prosecution of
 24 favorable evidence to the defendant in a criminal case violates due process).

25 ⁴ The court expresses no opinion on petitioner’s indication of his intent to withdraw claims two
 26 and four as leave of court is not required to voluntarily dismiss any claim.

27 ⁵ Petitioner filed his state habeas petition on April 6, 2020 before the one year statute of
 28 limitations commenced. See ECF No. 52-2. The Sacramento County Superior Court denied this
 petition on July 2, 2020. See ECF No. 52-1.

1 limitations had already expired and are therefore not entitled to any additional statutory tolling.
2 See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (concluding that once the statute of
3 limitations has expired subsequently filed state habeas corpus petitions may not restart it).
4 Respondent also contends that the two new claims do not relate back to petitioner's claims in his
5 original § 2254 petition. See Mayle v. Felix, 545 U.S. 644, 664 (2005) (defining related claims as
6 those that "are tied to a common core of operative facts."). Thus, the proposed new claims would
7 be untimely rendering amendment at this juncture futile. Id. For these reasons, respondent
8 requests the court deny petitioner's motion to amend. ECF No. 51.

9 Petitioner submitted another motion to amend on May 2, 2022 which the court construes
10 as his reply brief. ECF No. 53. Regarding the timeliness of his new claims for relief, petitioner
11 contends that he did not have adequate access to a prison law library from February 2020 until
12 April 2021. ECF No. 53 at 2. Petitioner acknowledges, however, that he discovered that the
13 record on appeal was missing a transcript on March 1, 2020. See ECF No. 53 at 14; see also ECF
14 No. 53 at 42 (letter from appellate counsel). Thus, petitioner was aware of the factual predicate
15 supporting his new claim for relief in Ground 8 prior to filing his original § 2254 petition in this
16 case. Petitioner also seeks to add a new claim in Ground 10 based on the ineffectiveness of his
17 trial and appellate counsel. ECF No. 53 at 64-74. Lastly, petitioner also wants to amend Ground
18 5 of his pending § 2254 petition by asserting that trial and appellate counsel were ineffective for
19 not noticing that the trial judge misstated CALCRIM 3471 on self-defense to the jury. ECF No.
20 53 at 75-85.

21 **III. Legal Standards**

22 Under Federal Rule of Civil Procedure 15(a), a litigant may amend his pleadings once as a
23 matter of course within 21 days after serving it or within 21 days after a responsive motion is
24 filed. See also 28 U.S.C. § 2242 (providing that a habeas corpus application "may be amended or
25 supplemented as provided in the rules of procedure applicable to civil actions"). "In all other
26 cases, a party may amend its pleading only with the opposing party's written consent or the
27 court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P
28 15(a)(2). Factors to be considered when ruling on a motion to amend a habeas corpus petition

1 include bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and
2 whether or not the party has previously amended his pleadings. Bonin v. Calderon, 59 F.3d 815,
3 845 (9th Cir. 1995).

4 Additionally, a one-year statute of limitations applies to all habeas petitions in federal
5 court. See 28 U.S.C. § 2244(d)(1). The statute of limitations generally starts once a state court
6 conviction becomes final at the conclusion of the direct appeal process. See 28 U.S.C. §
7 2244(d)(1)(A). The limitations period is not tolled from the time when a direct appeal in state
8 court becomes final to the time when a first state habeas petition is filed because there is nothing
9 “pending” during that interval. Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). While the
10 statute of limitations is paused during the pendency of any properly filed state habeas corpus
11 petition, the clock does not stop running after a federal habeas petition is filed. See 28 U.S.C. §
12 2244(d)(2); see also Duncan v. Walker, 533 U.S. 167 (2001) (holding that a federal habeas
13 petition is not an “application for State post-conviction or other collateral review” to be entitled to
14 statutory tolling of the one-year statute of limitations).

15 This one-year statute of limitations becomes an issue when a federal habeas petitioner
16 seeks to add new claims to his petition long after it has been filed. Under Rule 15(c)(2) of the
17 Federal Rules of Civil Procedure, an amendment of a pleading relates back to the date of the
18 original pleading when “the claim or defense asserted in the amended pleading arose out of the
19 conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.”
20 This rule applies in habeas corpus proceedings. Mayle v. Felix, 545 U.S. 644, 650 (2005);
21 Anthony v. Cambra, 236 F.3d 568, 576 (9th Cir. 2000). In Mayle, the Supreme Court held that
22 relation back is appropriate if the claim to be amended into the petition is tied to the original
23 timely petition by “a common core of operative facts.” Mayle, 545 U.S. at 664. Conversely, the
24 claim does not relate back when it asserts a new ground for relief supported by facts that differ in
25 both “time and type” from those the original pleading set forth. Id. at 650.

26 **IV. Analysis**

27 In determining whether to grant leave to amend, the court must consider whether the
28 proposed new claims are timely. In this case, the new claims do not relate back to the seven

1 claims presented in the original petition. See ECF No. 1; see also *Mayle v. Felix*, 545 U.S. 644
2 (2005) (holding that an amended habeas petition “does not relate back (and thereby escape
3 AEDPA’s one-year time limit) when it asserts a new ground for relief supported by facts that
4 differ in both time and type from those the original pleading set forth.”). The proposed new
5 claims in Grounds 8 and 9 do not relate to the same core facts as the timely filed claims in the
6 original § 2254 petition. The first four claims in the original § 2254 petition relate to petitioner’s
7 wife’s statement to police. The remaining three claims for relief concern jury instruction
8 challenges and a cumulative error claim. The proposed new claims in Grounds 8 and 9 revolve
9 around witness Michael Carbajal. Applying Mayle, the undersigned finds that these new claims
10 do not relate back to the claims in the original petition and are thus untimely.

11 Liberally construing petitioner’s pro se pleadings, petitioner requests equitable tolling of
12 the statute of limitations based on his limited access to a law library between February 2020 and
13 April 2021. A court may equitably toll the statute of limitations if petitioner demonstrates: 1) the
14 existence of an “extraordinary circumstance” that prevented him from timely filing; and, 2) that
15 notwithstanding such an impediment he was diligently pursuing relief. See *Holland v. Florida*,
16 560 U.S. 631, 649 (2010). Additionally, petitioner must demonstrate the causal relationship
17 between the extraordinary circumstance and the untimely filing. Spitsyn v. Moore, 345 F.3d 796,
18 799 (9th Cir. 2003). “[T]he threshold necessary to trigger equitable tolling under AEDPA is very
19 high, lest the exceptions swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir.
20 2002) (citation omitted). As a consequence, “equitable tolling is unavailable in most cases.”
21 Miles v. Prunty, 187 F. 3d 1104, 1107 (9th Cir. 1999). The undersigned first notes that petitioner
22 does not allege that he was completely deprived of access to the law library during this time
23 period. Secondly, petitioner was able to file his first state habeas petition during this same time
24 period even with limited law library access. Based on the record before the court, the
25 undersigned does not find that limited law library access was the but-for cause of the delay in
26 submitting petitioner’s new claims for relief in this case. See ECF No. 52-2 at 18-158 (containing
27 petitioner’s numerous filings in the Sacramento County Superior Court between June 1, 2020 and
28 September 20, 2020); see also *Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009) (emphasizing

1 that prisoner was able to file “other substantial legal filings” during the time period in which he
2 was denied access to law library). Moreover, limitations on law library access and research
3 materials are not extraordinary, but rather are normal conditions of prison life. Chaffer v.
4 Prosper, 592 F.3d 1046, 1049 (9th Cir. 2010). In this case, equitable tolling is not warranted and
5 does not render any of the proposed new claims for relief timely. Therefore, amendment would
6 be futile.

7 With respect to the new ineffective assistance of counsel claims raised for the first time in
8 petitioner’s reply brief, the undersigned finds that petitioner has unduly delayed in seeking to add
9 them to his § 2254 petition. The underlying facts of Ground 10 relate to trial counsel’s decision
10 not to call petitioner’s wife to testify in his defense. The requested amendment to Ground 5 is
11 based on counsel’s failure to notice that the trial judge misstated CALCRIM 3471 on self-defense
12 when reading it to the jury. Petitioner does not explain why he delayed for years in raising these
13 claims that he knew or should have known at the time of trial. Thus, the undersigned
14 recommends denying petitioner leave to amend in order to add new ineffective assistance of
15 counsel claims in Grounds 10 and 5 based on his undue delay.

16 The court additionally finds that allowing petitioner to continually add, amend, and
17 supplement claims is prejudicial to respondent. The ever-evolving habeas claims in this case
18 appear to be a moving target which respondent can not fully brief before petitioner seeks to alter
19 his claims. See e.g., ECF No. 53. The court emphasizes that seriatim amendments and
20 supplements to a § 2254 petition are not helpful in reaching a speedy and just resolution of
21 petitioner’s habeas claims. For all these reasons, the undersigned recommends denying
22 petitioner’s motion to amend.

23 **V. Plain Language Summary for Pro Se Party**

24 The following information is meant to explain this order in plain English and is not
25 intended as legal advice.

26 The court has reviewed your motion to amend and determined that your new claims would
27 be untimely filed and that you unduly delayed in presenting some of them. The undersigned
28 recommends denying your motion to amend. If you disagree with this recommendation, you have

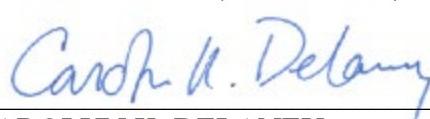
1 14 days to file a written explanation as to why it is not the correct outcome. Label your
2 explanation as "Objections to Magistrate Judge's Findings and Recommendations." The district
3 court judge assigned to your case will review your objections and make the final decision on your
4 motion.

5 Accordingly, IT IS HEREBY ORDERED that the Clerk of Court modify the docket to
6 reflect that petitioner's filing received on May 12, 2022 (ECF No. 53) is a reply brief to
7 respondent's opposition.

8 IT IS FURTHER RECOMMENDED that petitioner's motion to add claims (ECF No. 47),
9 which the court construes as a motion to amend his § 2254 petition, be denied for the reasons
10 explained herein.

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
16 objections shall be served and filed within fourteen days after service of the objections. The
17 parties are advised that failure to file objections within the specified time may waive the right to
18 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 Dated: August 3, 2022



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE